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## Review of “The Formative Era of American Law,” By Roscoe Pound

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sion of labors may have been made, there is no noticeable change in the style of writing. All chapters are presented in a mode of expression which is unusual for succinctness and clarity and cross-reference to various subsections dealing with other phases of the immediate problem.

Two chapters appearing in the third edition, dealing with "Locality and Jurisdiction" and "Criminal Procedure," have been omitted from the new edition. It is believed that the fact that many of the law schools combine the consideration of substantive law of crimes and criminal procedure would have justified inclusion of procedural topics and expansion of the book to the extent necessary therefor. A minor omission is very apparent: the table of contents would have been more helpful had it carried section titles as well as main chapter headings.

This volume will be of service to students and teachers of criminal law, and recourse to the periodical literature made readily available will be of great assistance in rounding out treatment which one wishes had not been curtailed by space limitations apparently imposed by the publisher.

WENDELL CARNAHAN.†

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THE FORMATIVE ERA OF AMERICAN LAW. By Roscoe Pound. Boston: Little, Brown and Company, 1938. Pp. x, 188.

If, as a brilliant Frenchman has said, the best literary style consists of a maximum of thought in a minimum of words, this little book by Dean Pound is great literature as well as an original, fascinating, and persuasive study of a neglected topic in Anglo-American jurisprudence. In his introduction President Rufus C. Harris designates it as "the first serious and comprehensive account of the formative period of American legal history."<sup>1</sup> The book is based upon four lectures delivered in 1936 before the faculty, students, and guests of Tulane University College of Law in commemoration of the centennial of the death of Edward Livingston, whom the author describes as the "great jurist of nineteenth century America and one to rank with Bentham."<sup>2</sup> As printed in book form the lectures are replete with references to authorities, most of them reported judicial opinions. It goes without saying that this feature of the printed book triples its value for pedagogical purposes.

By the formative era the author means the period from the Revolution to the Civil War. The law studied in this period is chiefly private law and criminal law—not constitutional law, not law which borders on, if it is not a part of, political science. The early development of federal constitutional law has been thoroughly treated by others and is barely touched on in the volume under review. The most notable feature of this American law as surveyed by Dean Pound is the comparative insignificance of federal judicial influence. Ruffin of North Carolina, Gibson of Pennsylvania, Shaw of Massachusetts—each receives more attention than Marshall. Story as a

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1. P. x.

2. P. 167.

writer of law books and a teacher of law receives ten times the attention paid to Story as a member of the federal judiciary for thirty-two years. Madison and Hamilton are not even mentioned, because, after all, their chief influence was in the field of political science and not in the field of law.

Many twentieth-century lawyers, including some teachers of law, blithely assume that in our early republican days the legal profession adopted the common law of Coke and Blackstone in the same way that teachers of literature adopted the poems of Milton and the essays of Addison. Dean Pound shows how untrue this is. The governmental factor in law is outside the direct control of practicing lawyers. Furthermore many lawyers in the early republican days preferred a legislative code of civil law to the English type of judge-made rules of conduct based on tradition. In those days political and military hostility to England was a reality of undoubted influence on American thinking. Factors of variance between English life and American life were over-emphasized on this side of the Atlantic. According to Dean Pound, it was not until about 1830 that the judge-made law of England was finally recognized as the basis of local jurisprudence in all states except Louisiana, where the civil law of Rome and the codification principle of Paris were triumphant over the tradition of Westminster.

The chief aim of Dean Pound's book is to explain why the judge-made law of England was gradually but generally and definitely received in this country. Perhaps the most potent reasons among many discussed by Dean Pound are these four: (1) the philosophy of natural law; (2) the doctrine of limited applicability of the common law; (3) legislative disillusionment; (4) the taught tradition of the legal profession.

The notion that the positive law of the state has a wavering margin and is surrounded by a halo of ideal justice derived from natural law makes it easier to accept an alien rule of positive law, even if temporarily harsh, because there is always the hope of beneficent modification. Undoubtedly this philosophical ideal is partly responsible for the American reception of English common law, which, of course, includes the idea of possible repeal or modification by the legislature. The philosophy of natural law is also partly responsible for the distinctive American notion that a written constitution is superior to a statute; and so, philosophy has helped to develop the doctrine of judicial review of legislation, which was first established in state courts and afterwards was taken over by the federal courts.

It is quite likely that English common law would never have been triumphant in this country had not the doctrine of limited applicability been stressed. The common law of England became the common law of Virginia and of Missouri only in so far as it was applicable to the needs and customs of Virginia and of Missouri. Either as an inherent qualification of the common law, or as a statutory modification of the common law, the doctrine of limited applicability is now recognized in this country wherever the common law is recognized. By the common law of England a wagon should be driven on the left side of the road. The Dutch settlers in the Hudson River valley and the Swedish settlers in the Delaware River valley

established the custom of driving to the right. When the common law was received in New York, Pennsylvania, and Delaware, there was a modification based on common sense and afterwards justified by the doctrine of partial applicability.

The history of early state legislation, with innumerable special acts manifestly due to political favoritism or financial corruption, was disillusioning to the American disciples of Bentham and of the French advocates of enacted legislation as something better for the average man than traditional law. American state statutes in the early period eliminated some patent evils in the common law of procedure, such as imprisonment for debt and the death penalty for hog-stealing. But in the domain of substantive law very little constructive legislation for the general good was accomplished or even attempted before 1830. And so lawyers and thoughtful citizens in general turned away from the legislatures and began to make a new appraisal of traditional law as a measure of human rights and human duties.

According to Dean Pound the most powerful single influence in establishing the western half of what we call Anglo-American law was the taught tradition of the legal profession. The ablest lawyers in the late colonial period were educated in England by English lawyers and were taught the tradition of the English legal profession. These men gave advice to American clients in American law offices and represented them in American courts before American judges. Some became American judges themselves. All of them taught the English legal tradition to American apprentices. These American apprentices became American lawyers and judges. Some of them established law schools, and the others took apprentices into their offices. All the way down to the Civil War every American lawyer was also a teacher, either of apprentices in a law office or of students in a law school. The apprentices and students were always taught the traditional attitude of the English legal profession toward common law, equity, and acts of Parliament. They read English reports and English commentaries. Very early in the formative era American text-books began to appear. The authors were steeped in the tradition of the English legal profession which soon became practically identical with the tradition of the American legal profession, and this was largely due to the persuasive power of these authors. The governmental element in American law was supplied by the judges on the bench. The intellectual power to synthesize American state law with the judge-made law of England was supplied by the doctrinal writers of the formative era. Dean Pound in his fourth lecture names the twelve most influential of these American doctrinal writers. In chronological order they are Reeve, Kent, Gould, Story, Wheaton, Greenleaf, Wharton, Sedgwick, Rawle, Bishop, Parsons, and Washburn.

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